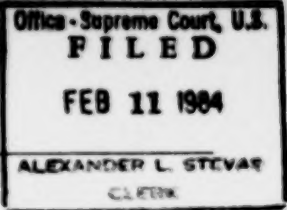


No. 83-851.



In the
Supreme Court of the United States.

OCTOBER TERM, 1983.

SOUTH STREET SEAPORT MUSEUM,
AS OWNER OF THE BARK PEKING,
Petitioner,

v.

CRAIG MCCARTHY,
Respondent,

AND

THE STATE INSURANCE FUND AND NORTHBROOK
EXCESS AND SURPLUS INSURANCE COMPANY,
Respondents.

Brief in Opposition to Petition for Writ of Certiorari.

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Introduction.

The respondent in this matter, Craig McCarthy, is a working man who was injured on December 12, 1979, when a gantline parted and he dropped sixty feet down the mainmast of the PEKING, a four-masted bark moored afloat at a pier on lower Manhattan. The injuries to his spine and internal organs were serious. He underwent an exploratory lap-

arotomy — abdominal surgery — and suffered the removal of a third of his large intestine.

The ship was owned by his employer, the petitioner South Street Seaport Museum, which had: 1) taken the gantline aboard knowing it was unfit; 2) stored it in a leaky bosun's locker, increasing its deterioration; and 3) directed that it be used for Mr. McCarthy's work aloft, painting the mast. Mr. McCarthy brought this action under § 5(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b), which allows an employee to bring an action and recover against an employer vessel for injuries "caused by the negligence of the vessel" — here, the acquisition, storage, and use of the defective gantline.

The case has not yet gone to trial. The district court granted summary judgment for South Street, holding that Mr. McCarthy was not engaged in "maritime employment," 1981 A.M.C. 2995 (S.D. N.Y. 1981). The Court of Appeals agreed, 676 F.2d 42 (1982). That issue was put to rest when this Court vacated the judgment and remanded the case for further consideration in light of *Director, OWCP v. Perini North River Associates*, 459 U.S. ___, 103 S.Ct. 634, 74 L.Ed.2d 465 (1983), 459 U.S. ___, 103 S.Ct. 809, 74 L.Ed.2d 1010 (1983).

On remand, South Street argued that, whatever the nature of Mr. McCarthy's employment, its ship is not a "vessel" within the meaning of the Act. The Court of Appeals reached the not surprising conclusion that a four-masted steel-hulled 377-foot vessel weighing 2,883 net tons is indeed a vessel, 716 F.2d 130 (2d Cir. 1983). South Street thereupon petitioned for a writ of certiorari. This brief is respectfully submitted, at the Court's request, in opposition to that petition.

There are two reasons why the petition should be denied and the case sent back to the district court for a prompt trial.

The Statutes.

First, the general statutory definition of "vessel" is clear and unambiguous. The term "includes every description of watercraft or other artificial contrivance used, *or capable of being used*, as a means of transportation on water." 1 U.S.C. § 3 (emphasis added).¹ There is no legitimate question, even at this pretrial stage of the case, that the PEKING fits this statutory definition and that this Court should not spend any time reviewing the issue.

As the court below noted, the further definition of "vessel" which Congress does use in the Longshoremen's and Harbor Worker's Act, 33 U.S.C. § 902 (21), is merely circular. 716 F.2d at 134, neither adding to nor detracting from the language of 1 U.S.C. § 3. For that matter, Congress could not conceivably have intended to impose on this Act the limitation sought by the petitioner, that vessels covered by it be "navigating," or "in navigation," because the definitional section of the Act expressly provides, at § 902(3), that the covered employees include a "ship repairman" and a "ship-breaker." While repairmen may often, but not always, be engaged in work aboard vessels in navigation, ship-breakers — the knackers who tear apart dead hulks — manifestly never are aboard ships which have anything but a residual capacity to be used as a means of transportation.

In the present case, therefore, the rule sought by South Street — limiting § 905(b) only to vessels in navigation —

¹ When Congress has sought a more restrictive definition, it has found no difficulty in drafting one. Thus, in 46 U.S.C. 713, applying to merchant seamen and principally to the benefits afforded by the Jones Act (46 U.S.C. § 688 *et seq.*), but not to the statute in issue here and expressly limited to title 46, "vessel" is defined as "every description of vessel navigating on any sea or channel, lake or river, to which the provisions of this title may be applicable."

would lead to a thoroughly anomalous result. Although injured while painting the ship in order to repair and protect it, Mr. McCarthy would be deprived of the remedy expressly allowed by the statute. When the PEKING is ultimately broken up, however, some ship-breaker, were he to be injured in precisely the same fashion while dismantling the ship's top-hammer, would have an undeniable claim for relief against South Street.

There is no real basis in precedent, moreover, for reading into this statute a limitation which Congress so manifestly did not intend to impose. The petition cites a large and confusing assortment of cases from various branches of the law of admiralty — a monument to the technical obstacles faced by a plaintiff trying to obtain justice from the maritime industry — but virtually all of those cases have to do with the Jones Act or with the doctrine of unseaworthiness. (The balance contain *obiter dicta* but do not squarely address the issue presented here.)

The respondent of course concedes the soundness of limiting the Jones Acts' liberal benefits to merchant seamen aboard ships in navigation. Similarly, there is ample justification for limiting the doctrine of unseaworthiness — essentially, strict liability — to situations in which a ship should be expected to be seaworthy, that is, when it is or is going to be at sea.

Here, on the other hand, there is no Jones Act or unseaworthiness claim. Mr. McCarthy, who was undoubtedly a harborworker, a ship repairman engaged in maritime employment, seeks nothing more than the opportunity to prove that South Street's ship, and the management of that ship, failed in its duty of reasonable care. This is an opportunity clearly granted to him by Congress and not foreclosed by any apposite decision of this Court.

The Ship.

Second, the bark PEKING is in all relevant physical respects a ship. It has a tophammer (upper masts and spars), periodically in need of repainting. It has the bosun's chairs and line needed to do that repainting. It has a bosun's locker for storing that line — specifically here, a bosun's locker with a leaky overhead. It has someone to manage its operations and maintenance, e.g. in 1979, a manager who took aboard line he knew was unfit, and, after Mr. McCarthy's injuries, a new manager, an experienced merchant seaman carrying the title of "shipmaster." As would any other ship, it floats on the waters of the East River, exposed to the salt air, its tophammer rolling with the waves and wakes.

There is in the record below the affidavit of an experienced Navy Chief Boatswain's Mate and marine safety instructor (attached heretofore in full as an appendix). He says:

5. As I know from my experience at sea and at the [United States Merchant Marine] Academy, any ship, sail or power, is a large and complex piece of machinery designed and maintained to float on navigable waters. Ships used in navigation and ships permanently moored as museums are in most respects, relevant to lines and cordage, identical because they both must be moored, they both float, they both are visited by numbers of people, they both have various unattached appurtenances, and they both are exposed to the elements.

11. As I also personally know from my experience at sea and in teaching shipboard safety, precisely the same precautions should attend activity aloft whether a ship is

moored to a cargo pier or to a museum pier: when manila line is to be used as a gantline, it should be stowed in a completely dry Bosun's locker (so that exposure to water does not cause it to deteriorate more rapidly than normal); it should be used as a gantline only by or under the supervision of a person with an AB rating (gained only after six years at sea) or with comparable training and experience; it should be inspected by such a supervisor before each use by twisting open the lays and looking for broken fibers; and it should not be used for such a purpose if it is more than a year old.

12. It has been my experience that lines kept aboard properly managed ships for use as gantlines are always kept in the best of conditions because they are used to support human life.

The standard of care in negligence actions in a maritime context was set down by this Court in *Kermarec v. Compagnie Generale*, 358 U.S. 625, 632 (1959), as being "the duty of exercising reasonable care under the circumstances of each case." Here, it is impossible to ignore the fact that Mr. McCarthy, aloft in the tophamper of the PEKING, faced precisely the same set of circumstances he would have faced aloft in the tophamper of a vessel in navigation.

This very issue was addressed long ago by the District Court for the District of Massachusetts in *The C.H. Northam*, 181 F. 983 (1909), applying the predecessor of 1 U.S.C. § 3 to determine whether a hulk being dismantled on a Boston Harbor Island set adrift by a storm and thereby causing damage in a nearby anchorage, was a vessel. The court found, of course, that the PEKING was a vessel and for the most sensible of reasons: "[T]he negligence did not differ in character, so far as appears, from the negligence which would have been the

cause of the same damage if the craft placed on the beach and negligently permitted to go adrift had been in every respect a complete vessel." (181 F. at 985.)

The admiralty law of this nation is not so barren of common sense as to need this Court to tell it that a four-masted, 377-foot ship is, for purposes of determining the duty of care owed to its workers, a vessel.

The Claim to Charitable Immunity.

Finally, two associations of maritime museum operators have filed with this Court a joint brief of *amici curiae*, suggesting that: "The cost of restoring and preserving historic ships is so large and the available funds so small that historical ship preservation is already an endangered species. By raising considerably the cost of restoring and preserving historic ships, the decision below threatens total extinction of historic ship preservation efforts in the United States." (Brief of *amici curiae*, pp. 4-5.)

This is little more than an attempt to obtain for these ship museums the protection of the doctrine of charitable immunity. That doctrine has long been discredited, *President and Dir. of Georgetown College v. Hughes*, 130 F.2d 810 (D.C. Cir. 1942), and in all other areas of the law it has declined if not died. As Professor Prosser wrote in 1971, "the immunity of charities is clearly in full retreat; and it may be predicted with some confidence that the end of the next two decades will see its virtual disappearance from American Law." *Torts*, 4th ed., § 133, p. 996. See, also, *Restatement, Torts*, § 895E.

If this full retreat is to be reversed by this Court, the present case is the least appropriate with which to do it. The peti-

tioner museum, as it happens, is a major power in New York City real estate, part of "a \$216-million dollar package that stretches over seven blocks of lower Manhattan's most historic neighborhood."²

The *amicus curiae* National Maritime Historical Society, for its part, has identified as some of its sponsors and patrons the following entities: Abraham & Straus; Amerada Hess Corporation; Annenberg Fund; Vincent Astor Foundation; Bankers Trust Co.; Bloomingdales; Brooklyn Savings Bank; Chase Manhattan Bank; Chemical Bank; Crucible Steel Casting Company; Dow Corning Corp.; Gage & Tollner; W.R. Grace Foundation; Jakob Isbrandsten; Lykes Bros. Steamship Co., Inc.; Manufacturers Hanover Trust; Moore-McCormack Lines, Inc.; New York Telephone Co.; Ogilvy & Mather; Pinkerton's; Prudential Lines; RCA; Sea-Land Service, Inc.; and U.S. Lines.³

A responsible maritime museum has three options with respect to the sort of problems created for Mr. McCarthy. It can pay to assure that working conditions are so safe that injuries are not incurred by its workers. It can pay for insurance to compensate injured workers. It can itself make payments to compensate injured workers. What South Street and the two museum associations are asking this Court to allow is a fourth, irresponsible option — imposing the costs of injuries upon the injured workers.

The respondent does not at all mean to suggest that this is an unimportant case, a petition unworthy of this Court's attention. To Mr. McCarthy, the case is critically important. He was severely injured. He underwent major surgery. He still lives with his injuries. For South Street and the museum associations, playthings of wealthy real estate interests, banks,

²"The Waterfront Goes Boom", *New York* magazine, Nov. 10, 1980, p. 47.

³*Sea History* magazine, Autumn, 1982, p. 56.

and corporations, the petition is something else — an attempt to shirk responsibility. Mr. McCarthy is entitled to a prompt trial.

Conclusion.

For the foregoing reasons, the respondent Craig McCarthy respectfully submits that the petition for a writ of certiorari should be denied and the case should be remanded for trial in the United States District Court for the Southern District of New York.

Respectfully submitted,

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1a

Appendix.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

CRAIG McCARTHY,
Plaintiff,

-against-

80 Civ. 3258 (WK)

The Bark PEKING, her sails, equipment,
appurtenances, etc., and SOUTH STREET
SEAPORT MUSEUM,

Defendant and Third-Party Plaintiff,

-against-

THE STATE INSURANCE FUND and
NORTHBROOK EXCESS AND SURPLUS
INSURANCE COMPANY,

Third-Party Defendants.

STATE OF NEW YORK

ss.:

COUNTY OF SUFFOLK

Affidavit of Richard A. Browder.

RICHARD A. BROWDER, being first duly sworn, on his oath deposes and says that:

1. I reside at 68 Bayside Place, Amityville, New York, and am self-employed as a Marine Consultant. I make this affidavit of my own personal knowledge and in opposition to the defendants' pending motion for summary judgment.

2. I enlisted in the United States Navy in 1940 and retired in 1962 as a Chief Boatswain's Mate. In the course of my Naval service, I spent the first eight years on warships, then served

aboard merchant-type shipping and amphibious landing craft and spent two tours of duty as the Master of YTB's — ocean-going tugs.

3. In 1963, I was appointed an Instructor in Laboratory Seamanship at the United States Merchant Marine Academy, King's Point. Before retiring from the Academy, I also taught courses in Safety of Life at Sea (SOLAS) and first-year Navigation, and I originated a course in Marine Safety.

4. I have visited and examined two ships in use as museums — the frigate, USS CONSTITUTION, in Boston Harbor, and the bark, STAR OF INDIA, in San Diego Harbor.

5. As I know from my experience at sea and at the Academy, any ship, sail or power, is a large and complex piece of machinery designed and maintained to float on navigable waters. Ships used in navigation and ships permanently moored as museums are in most respects, relevant to lines and cordage, identical because they both must be moored, they both float, they both are visited by numbers of people, they both have various unattached appurtenances, and they both are exposed to the elements.

6. As a result of these similarities, both sorts of ships must be attached to piers when in harbor. Both sorts must maintain watertight integrity (that is, water must be kept from entering interior spaces, a point obviously of central importance to any kind of ship), as by using fenders to protect the hulls from adjacent piers. Both sorts of ships must restrict visitors' access to various parts of their decks, and both must lash or tie such appurtenances as accommodation ladders and boats. On both, the masts and rigging must be given routine maintenance.

7. For all of these necessary shipboard operations, all ships, including ships used as museums, must by their very nature keep on board quantities of line — various types of cordage. The line is used for rigging mooring lines, for braiding fenders, for cordoning off areas, for lashing appurtenances, and for rig-

ging Bosun's chairs to hoist men aloft. So far as these operations are concerned, it makes no difference whether a ship is used to carry cargo around Cape Horn or is used as a museum in New York Harbor.

8. The line needed aboard any ship is customarily, in maritime practice, stowed in an interior space known as a "Bosun's locker" and is customarily provided for these operations by the ship, not by ship-based repairmen.

9. I am informed and believe that there is testimony in this case to the effect that line used aboard the bark PEKING was stowed in a space below decks referred to by witnesses as "the Bosun's locker," and that line from the Bosun's locker was furnished to the plaintiff, Craig McCarthy, for use as a gantline to hold his Bosun's chair aloft during maintenance work on the ship's mainmast.

10. As I personally know from my own experience at sea, this storage of line aboard the Bark PEKING, and the supplying of it from the Bosun's locker to the plaintiff for use as a gantline, is entirely consistent with maritime practice aboard ships actually in navigation. Precisely the same things would have been done had the PEKING been at sea, in a foreign harbor, or in New York as part of a voyage.

11. As I also personally know from my experience at sea and in teaching shipboard safety, precisely the same precautions should attend activity aloft whether a ship is moored to a cargo pier or to a museum pier: when manila line is to be used as a gantline, it should be stowed in a completely dry Bosun's locker (so that exposure to water does not cause it to deteriorate more rapidly than normal); it should be used as a gantline only by or under the supervision of a person with an AB rating (gained only after six years at sea) or with comparable training and experience; it should be inspected by such a supervisor before each use by twisting open the lays and

looking for broken fibers; and it should not be used for such a purpose if it is more than a year old.

12. It has been my experience that lines kept aboard properly managed ships for use as gantlines are always kept in the best of conditions because they are used to support human life.

/s/ _____
RICHARD A. BROWDER

Sworn to before me this day of April, 1981

Notary